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85-1566

No. _ _____

Supreme Court of the United States

October Term 1985

Khililullah Kakar, Petitioner

v.

United States of America, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 22, 1986

QUESTIONS PRESENTED

1. Whether, as the court below ruled in this appeal of a conviction requiring specific criminal intent, the principles of Ulster County Court v. Allen, 442 U.S. 140 (1979) and Sandstrom v. Montana, 442 U.S. 510 (1979), authorize an instruction on such criminal intent, based on the fact that the jury "may infer that a person ordinarily intends the natural and probable consequences of his acts", where the instruction is not about the use of "inferences" from basic or evidentiary facts as asserted in Ulster County Court, and the effect would be the same as a direction that the jury "may presume" that the law so intends, in apparent violation of the scope and rationale of Sandstrom and Francis v.

Franklin, ___ U.S. ___, 105 S.Ct. 1965 (1985).

2. Whether or not a direction to a jury in cases involving specific criminal intent, that the jury "may" "infer" (meaning assume or conclude or presume) that a person ordinarily intends the natural and probable consequences of a act, is a proper instruction under the applicable law, as a matter of due process, in that it is inaccurate or improper to instruct a jury in a criminal case that in all instances one may assume or "may" presume, or even should permissibly "infer" that parties intend all of the probable consequences of all of their acts, which is the effect of the instruction, because (a) they often act or proceed or decide on the basis of unknown facts; (b) the instruction

dilutes the government's burden to show "mens rea" intent; and as a consequence, the instruction essentially permits a tort principle to govern specific intent or "mens rea"; and thereby, it also unconstitutionally alters the burdens and presumptions of innocence for criminal cases, except perhaps, for those where criminal responsibility may be based on some form of negligence.

3. Whether a "Sandstrom" instruction related to criminal intent, when phrased "permissively" by using the phrase as to what the jury "may presume" or "may infer" about how conduct is generally viewed, through the general proposition of what the law deems people "ordinarily" intend, is improper because

it nonetheless means to a jury that it is a presumption or an assumption, and not an inference arising from predicate or evidentiary facts; and thus, whether the proposition in the instruction is saved from constitutional infirmity by this apparent misuse of the words "may" or "infer".

4. Assuming the "quasi-Sandstrom" instruction at bar is not constitutionally deficient in all cases, whether it may be employed in such form in the many federal prosecutions related to possession, where criminal intent is critical, where constructive possession may be a basis of the conviction, and where this instruction would thereby permit it without true mens rea.

LISTING OF PARTIES

There are no other parties other than Khililullah Kakar, a resident of the State of New York; and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Khililullah Kakar, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit referred to hereafter.

OPINIONS BELOW

The unpublished memorandum opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the petitioner's conviction for the lesser included offense of possession in violation of 21 U.S.C. § 841 et seq., was filed on December 24, 1985. It appears in the appendix to this petition, both in the form of the Judgment of affirmance and the Memorandum constituting the grounds of the ruling (App. 1-2 for Judgment; App. 3-7 for Memorandum Opinion).

Thereafter, a timely petition for rehearing was filed which was denied on January 21, 1986, the order for which appears in the appendix at App. 8.

The jury trial of petitioner was held before the Honorable Harold H. Greene.

JURISDICTION

The judgment and order of the United States Court of Appeals was entered on December 24, 1985 (App. 1). A petition for rehearing was denied on January 21, 1986 (App. 8).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), and otherwise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Sixth

Amendments of the Constitution of the United States, set forth in the Appendix at App. 9. The statutes involved included 21 U.S.C. § 841(a), 844(a), 846, the latter of which are not directly involved in the issues except as examples of "possession" statutes.

STATEMENT OF THE CASE

The petitioner in this case, Mr. Kakar, was acquitted by a jury of all charges in the indictment at issue, except the uncharged lesser included offense of possession, in a drug case in which it was asserted that he had engaged in a conspiracy, racketeering,

and interstate travel on two occasions (June 1, 1984 and June 5, 1984) to effect distribution and with the intent to distribute heroin. Kakar was one of the defendants charged. The others were Akbar Ayub and Abdullah Rahim.

Just prior to trial, the co-defendants, Ayub and Rahim pleaded guilty under a special plea bargain that affected charges in this case and elsewhere (August 27, 1984, Tr. 1-27). Kakar was sentenced to a year, which, less good time, has been served.

Pertinent evidence, which largely relates to instructions on the issues of criminal intent set forth in this

petition, reflects certain undisputed facts: that all three defendants were Afghans; that Rahim and Kakar had known each other in their country before living in the United States; that Rahim and Akbar were roommates; that Akbar had previously lived in the Washington area with one Merkle for a period of time; and that Kakar had a sister in the Washington, D. C. area (Alexandria) and a brother in New York, both of whom testified in the trial. All four were in a vehicle driven by Merkle when it was seized, the defendants arrested, and heroin found in a pouch inserted in a compartment in the front door on the driver's side. It was undisputed that Mr. Kakar drove to the East Coast in his

Camaro, initially with Akbar, Rahim and Rahim's friend, and thereafter with the co-defendants; stopped at Merkle's in Washington on June 1; left for New York where they remained and went their various ways (sometimes together); and that while in New York, obtained his nephew's car (a Ford Fiesta) to return to this area (Kakar stated to see his sister in Alexandria, Virginia to pursue the potential purchase of an eating establishment). The Ford Fiesta was temporarily obtained because the windshield of the Camaro became cracked en route and needed repair; and the license plates were expiring. Mr. Kakar's defense included the claim he had gone to New York to see his brother, and look into an interest in a pizza business there, just as he was looking into a like business in the Washington

area; and in doing so, he produced multiple business cards seized from him at the time of the arrest to support the defense. He asserted that the co-defendants went with him for their own purposes. The undisputed facts showed that Kakar was in the back seat on the return trip; all or most of the way he was sleeping; and that the only other driver on that critical return trip, beside Merkle, was Rahim. Kakar denied knowing that Rahim or Akbar were sellers of heroin and emphatically denied their charges that he (Kakar) was in fact, as the prosecution charged and the co-defendants testified, the chief trafficker, while Rahim was his alleged lieutenant, and Rahim's friend (Akbar), who was also a user, the other seller. Kakar also denied that the sums in his bank account were from drugs, by

producing evidence from family members of moneys accumulated before they fled the Russian invasion in Afghanistan and by showing funds he obtained in his work in this country. Kakar denied his co-defendants claim that he tried to bribe them at jail to take the blame for him. The informant in the case was Merkle, who was then under charges before the trip. He was ostensibly arrested with Kakar, Akbar and Rahim on their return to his home on June 4, 1984, when the heroin was seized, as noted, from the inside door pocket next to the front seat of the driver's side of the car. The testimony reflected that while Kakar slept in the back of the car, Merkle and Akbar were smoking heroin; that they had done so at other times before the return; and while there was some dispute on the point of whether

Kakar saw them smoking at all (he denied it and Merkle did indicate he did not), Merkle made clear that he had never heard of Kakar's name before, prior to their arrival in Washington and the trip to New York. (References to these facts in appendix below appear in our main brief to the Circuit Court, pages 15 to 34).

For the purposes of these issues, it is not necessary to detail all the inconsistencies and impeaching testimony that led to the acquittal of Mr. Kakar on all charges but the lesser included offense of possession. It is pertinent to note his "problem" in overcoming the charges, facts, and his co-defendants claims, without proper instructions on criminal intent and the meaning of possession: the cars used for the travel (the Camaro and Fiesta)

were his or in his control; he knew the co-defendants Rahim and Akbar; they were Afghans; and repeated objected-to efforts were made to underscore his nationality and Afghanistan as a commonly known source of heroin. While he had flatly denied knowledge of the obtaining of heroin by Rahim and Akbar, or was aware of use by Merkle and Akbar in his car, or use elsewhere, as they testified, he had been with them at various times during the four days and was in the back of the car on the return trip; it is undisputed that heroin was found in the car on the driver's side and purportedly seized as a result of a tip from Merkle before the trip; and further, that some months earlier, unknown to him Rahim gave him a heroin cigarette that made him vomit and very ill. These facts meant not only

disproving the charges by these very co-defendants that he was their chief, but also dealing with associations --- with the defendants, their habits, the car (which was the container of heroin), and the perceptions this evidence created, in view of the overall circumstances leading to the fact that the heroin was indisputably found in packets in the car door. The co-defendants asserted it was in a pouch which Kakar took from the trunk of the Fiesta, a fact he denied, and which tended to be disproved by testimony from his nephew, who had given him the Fiesta.

The contention below was that the jury found guilt on the basis of erroneous, burden-lessening, and burden-shifting intent instructions, association evidence, and an unbalanced summary of the evidence, among other

things, but particularly because of two instructions, one directly related to the issue of criminal intent and intent to possess; and the other related to possession and constructive possession, which reflected why in this close case, or any "constructive" one, a "quasi-Sandstrom" instruction is so prejudicial.

Over objections, and contrary to the defendant's proposed instructions, the trial court instructed that (Tr. 64-68, 1.18, App. 77-79):

> The law recognizes two kinds of possession: actual possession, and constructive possession.
>
> A person who knowingly has direct physical control over something at a given time is in actual possession over it. I have actual possession of this glass of water. A person who

although not in actual possession knowingly has both the power and intention at a given time to exercise dominion and control over something either directly or through another person is in constructive possession. You have constructive possession of your television or furniture at home even if you don't have it right now. (emphasis added)

The law also recognizes that possession may be sole or joint. If one person alone has actual constructive possession of something, the possession is sole. If two or more persons share actual or constructive possession, possession is joint. Mere presence in the vicinity of a piece of property, or mere knowledge of its physical location does not constitute possession. You may find that the requirements for possession of property are satisfied only if you find the government has proved beyond a reasonable doubt that the defendant had actual or constructive possession of the property either alone or jointly with others. (emphasis added)

That gets us to the second essential element of this offense, namely, the government must prove beyond a reasonable doubt that the defendant

possessed this heroin knowingly and intentionally. You may find that he knowingly and intentionally possessed this heroin if he did so consciously, voluntarily and purposely and not because of mistake or accident, or inadvertence.

Now . . . perhaps I should talk about intention at this point since I said the government had to show he had it intentionally. I will now define intentionally for you.

Intent means that a person had the purpose to do something. It means he acted with a will to do it. It means he did it consciously and voluntarily and not inadvertently or accidentally. Some criminal offenses require only a general intent. Where this is so and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act alone. Other offenses such as these here before us require specific intent. That means there must be more than just general intent to engage in certain conduct or to do certain acts. A person who knowingly does an act which the law forbids, intending with bad purpose to disobey or disregard the law may be found to act with

specific intent. (emphasis added)

Intent is a state of mind. It cannot normally be proved directly because there is no way of knowing what a person thinks or had the purpose to do. But you may infer defendant's intent from the surrounding circumstances. [emphasis added] You may consider any statement made, act done, or omitted by a defendant and all other facts and circumstances which indicate a state of mind. You may also infer a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. You should consider all the circumstances that you deem relevant in determining whether the government has proved beyond a reasonable doubt the defendant acted with specific intent. [emphasis added].

Now, to establish the third essential element of the offense of possession with intent to distribute heroin the government must prove beyond a reasonable doubt that he possessed the controlled substance, that is, the heroin, with a specific intent to distribute the controlled substance.

What I said a moment ago about specific intent applies to this element as well.

The term distribute means the actual constructive or attempted transfer of a controlled substance, that is, heroin through another person.

That takes care of basically of one of the three offenses that we are concerned with except unfortunately as another little wrinkle in it that I will charge you on, the others aren't quite that complicated, I don't think.

The law permits you to find a defendant guilty of a lesser included offense that is necessarily included in the offense charged in the indictment, assuming that the evidence points to his guilt of that particular offense. In this particular case the offense of possession with intent to distribute heroin has a lesser included offense of possession of heroin without any intent to distribute it. I will explain to you in a moment how you get to that. [emphasis added]

If you find that the government has proved possession with intent to distribute heroin then you may find the defendant guilty of that offense and you

don't have to do anything more with respect to this particular part of the charge.

If you find that the government has not proved the defendant's guilt of possession with intent to distribute heroin, or if you can't agree unanimously on that point, then you should next consider whether the government has proved his guilt of the lesser included offense of simple possession of heroin. And without going into a great deal of detail as the explanation I have given you implies, the elements are exactly the same except you will not need to consider whether was an intent to distribute heroin. So if you get to the point of simple possession the government must prove beyond a reasonable doubt: (1) that the defendant possessed the heroin; and (2) that he possessed it knowingly and intentionally. If you find those two you would be justified in finding him guilty of that charge. [emphasis added]

The contention below was this: one may surely tell a jury that it can derive specific criminal intent from circumstances, but when it said it could

find criminal intent based on a general proposition about conduct which it "may also infer", that "a person ordinarily intends the probable consequences of his acts", it was not providing a reference to facts in the case or a "true inference", but simply a general proposition applied to all cases that assumed or concluded that this proposition should guide the jury.

The thrust of the argument below was that Ulster County Court v. Allen, even Sandstrom, and Francis and the other cases that might relate to this issue, all involve approving or disapproving the instruction in circumstances where the use of the term "infer" or "inference" meant what we normally believe --- some reference (mandatory or permissive) from established facts and that it was

related to specific "predicate" or "basic" facts in each case, and that this Court had not analyzed, nor meant that merely by inserting words that the jury "may presume" the proposition in Sandstrom, that that would have saved it. See County Court of Ulster County v. Allen, 442 U.S. 140, 99 S.Ct. 2213 (1979), Francis v. Franklin, ____ U.S. ____, 105 S.Ct. 1965 (1985), and Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

That should be so because, when read and heard, it becomes clear it is stating the same thing to the jury as Sandstrom: a proposition or presumption, not a reference to a "true" inference to be drawn from specific facts in evidence.

One of the special ironies is that it appears directly contrary to

what the lower court expressly told the jury in Francis: that criminal intent must not be inferred. Here the jury is told, at the least, the reverse. Setting aside the different perceptions in the majority and dissent in Francis, over the impact of that lower court's criminal intent admonition to the issues in Francis, it ought to reflect how patently incorrect any such quasi-Sandstrom instruction is. It specifically permits what both the dissent and majority in Francis appeared to disapprove: the finding of criminal intent by a propositional or general conduct "inference" that is a legal presumption in fact.

Here, Mr. Kakar knowingly took his nephew's car. He knowingly went with his friends to Washington, D. C. He did not search them or the car. The

car was the container of the heroin. The trial judge told the jury that there could be constructive possession of a TV set by one who is out of a house, as long as one owned or controlled its container solely or with others (the nephew or the co-defendants) --- there the house, here the car. This meant that by sitting in the back seat of this car, under these instructions --- as owner or with the power to control the "container" (the car) and not merely the one present --- Mr. Kakar could be and probably was found guilty because he could have refused to let Rahim or Akbar go with him, or he failed to search them, or he should have known from his associations they were into drugs, and thus, he should have taken more precautions. That could be found, and likely was found, simply because the

jury could find the requisite criminal intent, based solely on the fact one is deemed to intend the natural and probable consequences of his "knowing" acts or omissions.

That is not what Ulster County Court or Sandstrom dicta, appeared to permit.

Moreover, it was contended below, it is simply not true that in all instances people specifically intend the natural and probable consequences of their acts. They may intend some of them. They may intend to bring about certain immediate results. Very frequently they are so uninformed that they are unable to know precisely what their "specific intentions" are. They may have an intention to go to New York with certain friends, but that does not mean that that intent involves "criminal

intent". People often do not even know the consequences and certainly do not always, or even more likely than not, "intend" the consequences to be criminal. That instruction may be appropriate to tort and negligence law which holds people to responsibility irrespective of informed intent; it is not appropriate in the criminal law generally, and particularly where "constructive possession" may be a basis of a federal conviction under any federal statute. See Morisette v. United States, 342 U.S. 346 (1952).

The phrase has been rotely repeated, to be sure, and analyzed as to whether it seems to be in the "permissive" or "mandatory", but in fact, it is always a presumption about general conduct. Inserting the deceptive words "may infer", into

Sandstrom language may make it "quasi-Sandstrom", but it still states nothing different in meaning to a jury than it "may presume" that that is the law. It is just another way of telling a lay jury, by only superficially less direct means, what the law presumes about intent. Worse, it does not belong in any criminal case where specific intent is involved, or any form of "mens rea" is critical; and especially in "constructive possession" cases. Particularly in them, it lessens the burden of the government and it certainly results in an impermissible shift of the defendant.

If there were to be any allowable instruction, it should be limited to permitting the jury to infer the necessary specific intent from the found circumstances and acts, and not

based on a general proposition about one's presumed intentions in other instances.

This case provides a clear example of why that is so, and especially true for such "constructive" crime cases. In this instance, as we have noted, Mr. Kakar was a person who was in a vehicle with others at the time of arrest when certain heroin was found by the police. "Mere" physical presence (or any instruction on it) did not address the issue. Mr. Kakar was the owner of the car that was used by the group of people to go to New York. There was trouble with that vehicle (a Camaro), resulting in a change of vehicles (to his nephew's Fiesta), so that when they returned to the District of Columbia after being in New York for a period of time, he used his nephew's

vehicle; and he (or his nephew) were in control of it. There were four persons in that vehicle. Mr. Kakar was not the driver, however. Yet, he certainly was the one in control of the container (the Fiesta), just as in the court's example one possesses a TV within a house, although not there. Here, we underscore, the car was like the house which had the television. The driver of the vehicle (one Merkle) evidently was an informant. The other two parties in the vehicle were persons whom Mr. Kakar knew as friends, one Rahim and Akbar.

Simply by not searching them, or by risking going with them, he met all the criteria necessary for the "criminal intent" to be convicted under this instruction. We emphasize this because it reflects that the claim of error at bar is not merely hypothetical,

or applicable to some other case; or that it is unusual. We note it because it reflects precisely why this instruction, however phrased, should be eliminated from all or most criminal cases.

REASONS FOR ALLOWANCE OF THE WRIT

In its Memorandum Opinion, the Court stated this (App. 5-6):

> We next conclude that the charge to the jury was proper in all respects. Kakar's attempt to conflate the terms "infer" and "presume" is inconsistent with precedent. See, e.g., Ulster County Court v. Allen, 442 U.S. 140, 157 (1979). The instruction that the jury "may also infer that a person ordinarily intends the natural and probable consequences of acts knowingly done," Tr. 66 (emphasis supplied), constituted

> only a permissive inference which placed no burden on the defendant. See Ulster County Court v. Allen, 442 U.S. 140, 157 (1979); see also Sandstrom v. Montana, 442 U.S. 510 (1979). [emphasis added]

The reference in Ulster, upon which the Circuit Court's Memorandum Opinion relied, makes a critical distinction not applicable to this case, which it overlooked when it approved this standardized instruction.

In the part it relied upon, Ulster was referring to true inferences --- inferences from "evidentiary" or "basic" facts in evidence, not, as here, a statement of legal principle or general conduct. This is confirmed by the statement in Ulster County Court appearing on the page before the reference noted in this Court's memorandum. The majority opinion in

Ulster emphasized that what renders these devices permissible (whether mandatory or permissive) is their use ". . . for the trier of fact to determine the existence of an element of the crime --- that is, an 'ultimate' or 'elemental fact' from the existence of one or more evidentiary or basic facts . . ." Ulster, 442 U.S. at 156.

It does not meet the standards set forth in this critical portion of Ulster:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an "ultimate" or "elemental" fact -- from the existence of one or more "evidentiary" or "basic" facts. E.g., Barnes v. United States, 412 U.S. 8937, 843-844, 93 S.Ct. 2357, 2361-2362, 37 L.Ed.2d 380; Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 1244, 87 L.Ed.2d 1519; Mobile, J. &

K.C.R. Co. v. Turnipseed, 219 U.S. 35, 42, 31 S.Ct. 136, 137, 55 L.Ed. 78. [emphasis added]

It was after this critical distinction that Ulster then went on to state what this Court appears to have been referring to in its Memorandum decision at 157. There, it said this:

> The most common evidentiary device is the entirely permissive inference or presumption, which allows -- but does not require the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. See, e.g., Barnes v. United States, supra, 412 U.S., at 840 n. 3, 93 S.Ct., at 2360 n. 3. In that situation the basic fact may constitute prima facie evidence of the elemental fact. See, e.g., Turner v. United States, 396 U.S. 398, 402 n. 2, 90 S.Ct. 642, 645, n. 2, 24 L.Ed.2d 610. When reviewing this type of device, the Court was required the party challenging it to demonstrate its invalidity as applied to him. E.g., Barnes v. United

States, supra, 412 U.S., at 845, 93 S.Ct., at 2362; Turner v. United States, supra, 396 U.S., at 419-424, 90 S.Ct., at 653-656. See also United States v. Gainey, 380 U.S. 63, 67-68, 69-70, 85 S.Ct. 754, 757-758, 758-759, 13 L.Ed.2d 658. Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination. [emphasis added]

The essence of the Memorandum Opinion appears to be that because the standardized instruction provided below, modified the words by inserting the words "may infer" before the

proposition, it converted that "intent" proposition into an alleged "permissive inference" which saved it.

While there may be dicta in Sandstrom to suggest that result, we think it has been misread. This Court was not there precluding the right of a jury to infer intent from surrounding circumstances, or even perhaps, from "intended" consequences, duly found. However, propositions that persons generally are held to have intended the consequences of their acts or omissions, plainly lessen and misstate the criteria for specific criminal intent by converting into a form of intent similar to tort liability. That is precisely what the instruction informs the jury. We do not read Sandstrom or its dicta as seemingly approving a finding of specific criminal intent by resolving it

through the allegedly "permissive" proposition that one intends the natural and probable consequences of one's acts.

There is a second ground which has been asserted in our positions, and which it is believed that the Memorandum Opinion below overlooked or misapprehended: that the entire instruction is itself irrational, and not constitutionally permissible in any event. It is not true, nor more likely than not, that people either intend or know, or could conceivably intend or know all the consequences of their acts or omissions, at least in many cases. Moreover, the fact is that it cannot be inferred that they do intend to act with specific criminal intent; the law is quite to the contrary, as Francis reflects. That is a further reason as to why the entire instruction, as

phrased, should be eliminated or altered, and why this Court should grant the writ.

In this regard, there is a still further reason: even if there is doubt as to our view on the foregoing points, there should be none that it may not be permitted in criminal cases involving "constructive" possession or other "constructive" crimes. The Opinion below addressed this point by alluding to the example given in the trial court's instruction, relating to the taking of the television set from someone's home. In response to our contention, the Memorandum decision stated this (App. 5-6):

> Even viewing this instruction in conjunction with the trial judge's instruction on constructive possession and his

> example of a television in the home as illustrating constructive possession, we perceive no danger that the jurors might have interpreted the judge's charge as permitting them to find Kakar guilty solely on the basis of his ownership or control of the car in which the heroin was found. The trial judge explained to the jury that "[m]ere presence in the vicinity of a piece of property, or mere knowledge of its physical location does not constitute possession." Tr. 65. He also repeatedly stressed that the defendant must possess the heroin 'knowingly and intentionally' . . . .

The difficulty with the Court's observation --- as it related to whether such an instruction saves the infirmity --- is that the physical presence instruction did not address the problem or basis of the conviction below and would not do so in other cases.

In our case, that error was compounded by the trial court's overruling of Mr. Kakar's objection to

any constructive possession based on the facts and theory of the case, and further its refusing a specific request from Mr. Kakar that he receive his instruction number 2 going to the critical matters beyond presence. That instruction read as follows (App. 39-42 below):

> I specifically instruct you that simply being present in a vehicle where narcotics are later found is not proof or evidence of any criminal act of the person present in that vehicle.
>
> I further instruct you that the mere fact that the vehicle was a vehicle used or owned by his nephew or by a brother is no evidence whatsoever of any criminal act on the part of the Defendant Kakar. I advise you that merely because Mr. Kakar may even at one time been friends of Mr. Rahim or Ayub, who were engaged in the admitted criminal activity, is no evidence whatsoever of any wrongdoing or criminality on his part. [emphasis added]

> No person should be found guilty by association. As I have indicated, the government must prove each and every element of its case beyond a reasonable doubt. The mere fact that there was some association between him and Mr. Rahim and Mr. Ayub as friends, or the mere fact that he was in the vehicle with them or the mere fact that the vehicle in which the narcotics were found was that of a relative of Mr. Kakar's is no evidence whatsoever that Mr. Kakar was in any way involved in the matters that are here charged. None of the that shows participation in itself sufficient to meet the government's burden. [emphasis added]

In short, the issue was not about mere presence at all: it was the association with the co-defendants who testified against him, and the association with the car, the container of the heroin; that the car was like the house; and why only an allowable specific intent without references to

what people generally intend based on the natural and probable consequences of their acts (and an actual possession instruction) were required.

Moreover, as Mr. Kakar suggested below, the words "knowing" and "intentional" simply do not save the instruction, contrary to the claim of the Memorandum Opinion. He there asserted what applies here:

> . . . Mr. Kakar knowingly used his own car (the Camaro) for the trip here and to New York, and the Fiesta was his nephew's car, which he obtained for the trip back. Mr. Kakar knew, according to one "version" of the evidence, that while he denied knowledge of drug use on this trip, there was one incident months earlier in which he was given some drugs by defendants Rahim and Ayub. . . . (In) short, it could certainly be "inferred" from those facts of a "knowing and intentional" nature that if he went any place with these co-defendants --- e.g., on a trip --- . . . a jury might

believe, he must have "intended" the "natural and probable" consequences of his act knowingly undertaken --- they might have drugs with them. Thus, the so-called natural and probable consequences of his acts, under this instruction, could be held against him and he could be found guilty on that ground alone --- the constructive possession instructional issues that worsen the matter to the side.

Criminal law requires mens rea, or criminal intent. See Morissette v. United States, 342 U.S. 346, 72 S.Ct. 240 (1952), discussed in Sandstrom, and Levine v. United States, 104 U.S.App.D.C. 281, 261 F.2d 747 (D.C.Cir. 1958), both of which underscore the importance of criminal intent as a specific kind of knowing violation of the law (even where the crime is not defined that way). Criminal

intent is different from the intent to do an act. It is different from an act "knowingly done or knowingly omitted". An act knowingly done or knowingly omitted may result in civil liability, to be sure. Criminal liability requires more, at least in most instances, than merely an act knowingly done or knowingly omitted. That is what the lower court in Francis was referring to when, as the Opinion noted, it informed the jury that "'criminal intention may not be presumed'" (Francis, 105 S.Ct. at 1974).

For this Court's purposes, it is not a question of whether this instruction violates the implications of Francis and was wrong, merely for Mr. Kakar; or that it was hardly harmless, particularly

because this was at least "a close case" --- as a panel member noted at oral argument. Rather, the writ should issue because the record at bar involves a common alleged offense, and reflects fairly clearly why this generally used instruction is grossly improper in a criminal case involving specific intent; or in most cases involving general criminal intent; and certainly, in all involving "constructive" possession under any federal statute.

It incorporates a standard for "tort" liability that ought to be finally removed from criminal cases, because it <u>does</u> alter the government's burden, and in turn, increases the defendant's: he cannot be silent; he must explain why, what he did or omitted to do,

failed to show that his specific or alleged general intent was not criminal.

CONCLUSION

The petition deserves to be granted to review these issues.

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March 22, 1986

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5784 & 84-5843 September Term, 19

United States of America,
Appellant

Criminal No. 84-00215

v.

Khililullah Kakar,
Appellee

FILED DEC 24, 1985

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WALD and Mikva, Circuit Judges and SWYGERT*, United States Senior Circuit Judge for the Seventh Circuit

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel for the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration thereof and for the reasons set forth in the accompanying memorandum, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

George A. Fisher
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

MEMORANDUM

Khililullah Kakar appeals from his conviction for possession of heroin. He argues on appeal that (1) the heroin should not have been admitted as evidence at trial; (2) the trial judge erred in his instructions to the jury; and (3) the defendant's ability to present his defense was impaired by various additional errors at trial. We find these contentions to be without merit.

Kakar first argues that the police lacked probable cause because Merkle, the police informant, had not been shown to be sufficiently reliable. We reject the defendant's underlying assumption that Illinois v. Gates, 462 U.S. 213 (1983) required the government to indicate the reliability of the

informant by providing a confirmed purchase. Other circumstances in this case sufficiently support the finding of probable cause for arrest. Merkle was in the car giving a prearranged signal indicating that the car contained heroin. The police knew the identity of their informant; they also knew the informant to be an eyewitness to the events about which he gave information. The argument that Merkle had an incentive to provide false information misses its mark; Merkle would surely have known that his "tip" would be subject to immediate confirmation when the police made their arrests. Because the police had probable cause for the arrest, the search of the passenger compartment of the car was permissible. See New York v. Belton, 453 U.S. 454 (1981).

We next conclude that the charge to the jury was proper in all respects. Kakar's attempt to conflate the terms "infer" and "presume" is inconsistent with precedent. See, e.g., Ulster County Court v. Allen, 442 U.S. 140, 157 (1979). The instruction that the jury "may also infer that a person ordinarily intends the natural and probable consequences of acts knowingly done," Tr. 66 (emphasis supplied), constituted only a permissive inference which placed no burden on the defendant. See Ulster County Court v. Allen, 442 U.S. 140, 157 (1979); see also Sandstrom v. Montana, 442 U.S. 510 (1979).

Even viewing this instruction in conjunction with the trial judge's instruction on constructive possession and his example of a television in the

home as illustrating constructive possession, we perceive no danger that the jurors might have interpreted the judge's charge as permitting them to find Kakar guilty solely on the basis of his ownership or control of the car in which the heroin was found. The trial judge explained to the jury that "[m]ere presence in the vicinity of a piece of property, or mere knowledge of its physical location does not constitute possession." Tr. 65. He also repeatedly stressed that the defendant must possess the heroin "knowingly and intentionally" which required a defendant to possess it "consciously, voluntarily and purposely and not because of mistake or accident, or inadvertence." Tr. 65, 66.

Finally, we conclude that the allegedly prejudicial comments by the

trial judge, the prosecution and the prosecution's witnesses do not require reversal. We have carefully considered Kakar's remaining contentions concerning entrapment, proposed jury instructions, chain of custody, co-conspirators, hearsay and the right to confrontation and find them to be without merit. Nothing in these challenged actions restricted Kakar's ability to present his defense.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5784 September Term, 1985

United States of America

v.

Khililullah Kakar

CR No. 84-00215

United States Court of Appeals
For The District of Columbia Circuit
FILED JAN 21 1986
GEORGE A. FISHER
CLERK

BEFORE: Wald and Mikva, Circuit Judges; Swygert*, Senior Circuit Judge, U.S. Court of Appeals for the Seventh Circuit

O R D E R

Upon consideration of the petition for rehearing and for order setting aside or modifying judgment and opinion of appellant Khililullah Kakar,, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. 294(d).

BEST AVAI

AMENDMENTS TO THE CONSTITUTION.

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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